VICTOR ALFRED GIFFORD
versus
MR MUZIRE
and
MORGAN MWACHETA
and
VAXSON MAPOSA
and
THE MINISTER OF STATE FOR NATIONAL SECURITY
IN THE PRESIDENT'S OFFICE RESPONSIBLE FOR
LANDS, LAND REFORM AND SETTLEMENT

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 18 September 2007

Urgent Chamber Application

D Drury, for the applicant
O Hodzi, for the first, second and third respondents
Ms *E Mwatse*, for four respondent

KUDYA J: This is an urgent chamber application for a spoliation order that was filed by the applicant on 12 September 2007. It was allocated to me on 13 September 2007 and I set it down for hearing on 18 September 2007. All the respondents filed opposing papers. The applicant did not have an opportunity to file his answering affidavit as the opposing affidavits were filed on 17 September by the fourth respondent and during the hearing by the first to third respondents (the new farmers).

THE FACTS

While the applicant initially averred in its founding affidavit that it was the owner of Wolfscrag situate in the district of Chipinge, Mr *Drury* for the applicant conceded in his oral submissions that the farm was acquired by and is now owned by the fourth

respondent (hereinafter referred to interchangeably as the Minister or the acquiring authority), since September 2005.

The Minister gave notice of eviction to the applicant on 12 March 2007. The letter was referenced: Authority of Temporary Extension of Stay on Farm to Wind up Business. It drew his attention to the coming into effect of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] on 20 December 2006 and highlighted the provisions of s 3 (2) (a) which ordered every former owner or occupier of gazetted land to cease to occupy, hold or use that land forty-five days after the fixed date, unless lawfully authorized to do so.

He was further advised that he should have vacated the farm on 4 February 2007, but following an assessment of his operations by the district technical committee and in line with guidelines drawn by the ministry he was allowed to wind up business and harvest his crops or dispose of his livestock consisting of 108 cattle, 47 sheep and 2 horses **only and strictly** (emphasis mine) by 30 June 2007. The temporary extension was given on five conditions. These were:

(a) Firstly, that he would not plant new crops in the fields or introduce additional livestock on the farm from the date of service of the notice of eviction;

(b) Secondly, no vandalism or removal of infrastructural developments identified by the valuation officers would occur;

(c) Thirdly, he would allow incoming legally authorized beneficiaries to use open fields and grazing paddocks to start agricultural activities and co-exist with them; Fourthly, he would undertake a handover-take over of the inventoried assets with ministry officials before he vacated the farm at the expiry of the temporary extension; and

(d) Lastly, notify the district/provincial land officer of any conflict that may arise during the currency of the temporary extension authority.

The applicant signed an acknowledgement of receipt on 3 April 2007. It reads as follows:

> "I V.A. GIFFORD of WOLFSCRAG farm acknowledges receipt of authority to stay on the farm for a temporary period to wind up business and harvest crops. I have read and understood the contents of this letter and will fully comply with the same and undertake to vacate the farm on the given date failure of which the Acquiring Authority will invoke provisions of section 3 of the Gazetted Land (Consequential Provisions)Act, [*Chapter 20:28*] in respect of my eviction."

On 16 April 2007 he wrote to the Minister seeking that he comply with the guidelines set out by his ministry in a minute of 8 January 2006, which amongst other things extended the cut off date for livestock to 30 September 2007. He highlighted that he would complete the harvest of his coffee crop in December 2007 and that his timber still had ten years to maturity. He stated his failure to plant maize was due to harassment by lands officials and sought an A2 farmer offer letter.

In the penultimate paragraph of his letter, he abandoned his pretensions at appealing and gave the Minister an ultimatum to reply within seven days lest he would deem himself duly permitted to continue with his farming business.

It is not possible for me to determine whether the Minister responded to this letter as it was produced from the bar at the hearing. It was not attached to the applicant's founding affidavit. The minister did not have the opportunity to comment on it in his opposing affidavit.

On 22 August 2007, the new farmers armed with the first respondent's offer letter issued by the Minister on 26 June 2007, moved onto the farm. At first the applicant averred that they broke a lock to a gate on the farm and that the Minister's official also broke a lock to gain access to the area where farming equipment and materials was kept. In his oral submissions Mr *Drury* abandoned these averments on broken locks and the consequent relief for their return.

The ministry official then compiled an inventory of the equipment and implements. The applicant averred that this process amounted to acquisition while the Minister averred that it was done for the accountability of the property. The onus is on the applicant in spoliation proceedings to show on a balance of probabilities that the equipment was seized. In the face of denials by all the respondents, I am not satisfied that he has done so on his papers. I find that the equipment and implements were neither acquired nor seized by any of the respondents.

THE SUBMISSIONS

Mr *Drury* submitted that the applicant had been despoiled both of his possessory rights of the farm and equipment and materials. He based his legal arguments on the judgment that I delivered in *Karori* (*Pvt*) *Ltd & Anor* v *Brigadier Mujaji* HH 23-2007. He also contended that as the respondents had resorted to self help, the matter was urgent.

Mr *Hodzi*, for the new farmers, submitted that the matter was not urgent because the new farmers had not evicted the applicant but were living in harmony with him. He also submitted that as they had utilized idle land, they had not despoiled the applicant. He contended that they were after all between a rock and a hard place in that they were obliged by the offer letter to take occupation within thirty days or lose the farm while their moving in was viewed as spoliation.

Ms *Mwatse*, for the Minister, abandoned her initial preliminary point on the dirty hands principle in the light of my opinion in the *Karori* case, *supra,* at p 3 that:

> "It does not seem to me that spoliation can be estopped on the basis of the dirty hands doctrine, for to do so would be to shield the despoiler from the consequences and reward him for his alleged usurpation of the due process".

She did not oppose the relief sought subject to the determination of the court on the submissions made by the applicant and the new farmers on spoliation. She submitted that no acquisition process of the equipment and materials had commenced which complied

with the provisions of s 4, 5 and 6 of the Acquisition of Farm Equipment or Material Act [*Chapter 18:23*].

RESOLUTION OF THE SUBMISSIONS

Urgency

All that an applicant has to show is that his matter cannot wait the observance of normal procedures and time frames set by the rules of court for ordinary applications without rendering nugatory the relief that he seeks. See *Document Support Centre* (*Private*) *Limited* v *T P Mapuvire* HH 117-2006 and *Dilwin Investments* (*Private*) *Limited* v *Jopa Engineering Company* (*Private*) *Limited* HH 116-1998.

It seems to me that the preservation of law and order and the prevention of self help in the resolution of disputes place an application for spoliation in this unique position. To wait for the ordinary time limits and procedures to apply would undermine these salutary aims and encourage the usurpation of the due process by the strong and well connected at the expense of the weak and disadvantaged. In determining whether a matter involving spoliation is urgent, the court will in the exercise of its discretion obviously be guided by the specific averments of fact that are made in the particular case before it.

I am satisfied that in the present matter the averments made establish the urgent need to determine whether the applicant has been despoiled. To await normal procedures and time limits would make the relief sought ineffective. It would reward the alleged act of self help. I therefore hold that the matter is urgent.

The Merits

The two essential elements of spoliation which must be made and proved are that:

a) the applicant was in peaceful and undisturbed possession of the property and
b) the respondent deprived him of the possession forcibly or wrongfully against his consent. See p 5 of the *Karori* case, *supra.*

The facts in the present matter are distinguishable from those in the *Karori* case. Firstly, the acquiring authority was not a party and secondly, there was a dispute as to whether the farm had been acquired. Letters from various government functionaries involved in the acquisition process did not shed light on this fact. There was no proof that the farm had been acquired. Lastly, there was no acknowledgement of receipt of the notice to vacate. In the present matter, the acquiring authority is a party to the proceedings, it was common cause that the farm was acquired and the applicant signed an acknowledgment of receipt of the authority to stay on the farm. An application of the same law to these different facts may result in a different conclusion. The *Karori* case does not have universal application to all cases of spoliation. The particular facts of each case determine its own outcome.

As regards the farming equipment and implements, I found that the applicant had not discharged the onus on him to show on a balance of probabilities that his physical control and entitlement to these movables had been disturbed. But even if it was disturbed, he did not prove that they were taken away from him or that he was denied his rights of access and use. The relief sought of declaring the purported acquisition of farm equipment and material invalid, in paragraph 4 of the draft order, cannot succeed.

As regards occupation of farming land, Mr *Drury* appeared to accept that the new farmers were utilizing idle land. He however contended that even the use of that land amounted to self help. He emphasized that the applicant did not consent to their presence on the farm nor was he involved in identifying the idle land. He further contended that the so called idle land was pasture for the applicant's livestock and highlighted the difficulties in identifying idle land. He also dwelt on the failure by the Minister to show that the provisions of the Agricultural Land Settlement Act [*Chapter 20:21*] had been complied with. He further submitted that an offer letter, lease agreement or permit did not repose in the new farmer a real or substantial interest to sue for eviction. I find that these last two submissions are not relevant to the question of spoliation.

The only relevant aspect of his submissions was the one that dwelt on the twin issues of whether the applicant was in peaceful and undisturbed possession and whether he was forcibly or wrongfully deprived of such possession.

In my view, it was common cause that the applicant had physical control of the farm in question before the new farmers occupied it on 22 August 2007. I however hold that, by operation of law, by 4 February 2007, his possession was no longer peaceful and undisturbed. The Gazetted Land (Consequential Provisions) Act was the source of the disturbance. Transient relief came for him in the form of the notice of eviction of 12 March 2007, which was served on him on 3 April 2007. The acquiring authority authorized him, as it is wont to do by virtue of s 3(2)(a) of the Gazetted Land (Consequential Provisions) Act, to stay until 30 June 2007. From 30 June to 22 August 2007 he remained in physical control of the farm even though his continued stay was illegal. In my view, possession that is tainted with illegality cannot be peaceful and undisturbed. The notice of eviction and his response to it of 16 April 2007 underscored the point that he was no longer in a peaceful and tranquil state of mind. I, therefore find that he neither had the right of nor the right to possess the farm. The absence of the mental right undermined the physical act. In my view, by operation of law, he did not have peaceful and undisturbed possession of the farm after 30 June 2007. But even if I am wrong on the application of the mental aspect of possession, and such possession denotes physical control only, it seems to me that the applicant's case would still fail on the basis of the second essential element of spoliation.

It seems to me that the acknowledgement of receipt that he signed on 3 April 2007 was not just an acceptance of service of the notice of eviction, but an express consent to the entry onto the farm of new farmers. It was a consent knowingly and deliberately given in the full knowledge of the five conditions set out in the notice of eviction. Any submission that he believed he was doing no more than merely acknowledging receipt of the notice is disingenuous and false. Once he had given this consent on 3 April 2007, it was

no longer necessary for him to give further consent, as he contended, on 22 August. The earlier consent could not be revoked once given. It was not revoked by the letter of appeal, which ended as an ultimatum, of 16 April 2007.

I am not persuaded that failure to respond to that letter amounted to an acceptance to be bound by its contents. **Hoffman and Zefferet**, relied on by Mr *Drury* for the proposition that the failure to respond to a letter indicated acquiescence to its contents and demands, in *The South African Law of Evidence*, 3rd edition, at pages 157-158 point out that such a conclusion must be the only reasonable inference that can be drawn, which in any event must exclude a failure to reply due to carelessness or disinterest. In *casu*, the letter of 12 March 2007 clearly closed the door on further appeals or ultimatums by use of the words "only and strictly". Assuming that the Minister did not respond, he may very well have shown disinterest in the contents of that letter which in essence sought to renegotiate the conditions of his continued stay on the farm, which had been closed by this letter.

His alleged failure to respond would not fall foul of the provisions of s 3 of the Administrative Justice Act [*Chapter 10:28*]. In any event, the remedies availed by s 4 and 6 of that Act were never utilized by the applicant. There is no provision in that Act for the applicant to extend his period of stay on acquired land on the basis that his proposal to that effect has not been responded to.

It was, after all, outside his powers to choose and approve the new farmers who would settle on the farm. Such a process was entirely in the hands of the acquiring authority.

I, therefore, find that the prior consent given by the applicant dispensed with the need for a court sanctioned eviction before the new farmers could move onto the farm. I hold that the applicant was not despoiled of the farm.

COSTS

I see no reason why costs must not follow the event.

CONCLUSION

Accordingly, the application is dismissed with costs.

Coghlan, Welsh and Guest, applicant's legal practitioners

Chirimuuta & Associates, first, second and third respondents' legal practitioners

Civil Division of the Attorney General's Office, fourth respondent's legal practitioners